

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D. C. 20001-8002**

DATE: October 31, 1996

CASE NO: 94-INA-549

In the Matter of:

**SEVEN SEAS RESTAURANT,
Employer,**

On Behalf of:

**GUADALUPE GUTIERREZ,
Alien**

Appearance: Ira Ehrlich, New York, NY
for the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Guadalupe Gutierrez ("Alien") filed by Employer Seven Seas Restaurant ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York City, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is

to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On September 1, 1992, Employer filed an application for labor certification to enable the Alien, a Mexican national, to fill the position of "Cook" at a salary of \$200 weekly, which was increased to \$288.93 weekly. (AF 19-22, 28-31). Two years of experience in the job offered was required; there was no educational requirement. The job offered was described as:

Subject will be respons[i]ble for the preparation and cooking of dishes such as Veal[] Cutlet Milanaise and Parmigiana, Shrimp Parmigiana., Eggpla[n]t Parmigiana, Pastas such as Spaghetti Marina[r]a and meat s[a]uce., Linguini with clam sauce (White and Red) L[inguini] Alfredo, Carbonara, Primavera., Seafood marin[ara] sauce., Seafood Broil[ed], Fry and Boiled Shrimps Scampi Filet of Le[mon] Sole., Salmon and Halibut Steak, Flounder, Red Snapper, Rainbow[] Brook Trout and Boston Scrod, Maine Lobster and South African lobster, Stuffed Filet of Sole with Fe[ta] Che[ese], with Crab meat and Spinach, Lobster stuffed with Crab meat., Stuffed Shrimps with crab meat over rice, Must plan daily menus.,

(AF 22, 31). Nothing was listed under "Other Special Requirements." (AF 22, 31).

A recruitment report from the state agency indicated that there were two applicants, both of whom were rejected, and stated, "It appears there is availability." (AF 70-72). The Employer indicated that one of the applicants (Cuthbert Williams) could not be reached despite repeated telephone attempts, although messages were left with his daughter and sister-in-law, and one (Curtis Stephen) had requested a higher salary as he was paid over \$350 at the Salvation Army. (AF 54, 59). Applicant Williams did not respond to an inquiry from the state agency but applicant Stephen indicated he had never been contacted, stated that he would be ready to work at the salary offered, and indicated his salary at the Salvation Army was \$200. (AF 61-70).

On March 2, 1994, the CO issued a Notice of Findings in which she notified the Employer of the Department of Labor's intention to deny the application because the Employer needed to further document the basis for rejecting the two U.S. applicants, as they appeared to be qualified (citing 20 C.F.R. §§ 656.21(j), 656.21(b)(7),¹ and 656.24(b)(2)(ii)). The Employer was asked to explain why applicant Williams was not contacted by mail, to document "dates, names and titles of persons in contact with applicants," to state whether applicant Stephen was offered the position and refused the offered salary, and to provide supporting documentation. (AF 73-75).

The Employer submitted its rebuttal on March 16, 1994 through a letter signed by its Secretary and attachments. (AF 76-83). The Employer disputed applicant Stephen's statement that he was not contacted and noted that the Employer would not know his social security number and the fact that he worked for the Salvation Army if that were so, as this information does not appear on his resume (a copy of which was enclosed.) With respect to applicant Williams, the Employer indicated that:

Regarding Mr. Williams, his resume shows that he is an experienced cook. Nevertheless, he did not make an effort to get in touch with us. We left messages at his home with his daughter and his sister-in-law. The least he could have done was to extend to us the courtesy of saying that he was not interested in the job.

(AF 83).

On March 28, 1994, the CO issued a Final Determination in which she found the Employer's rebuttal adequate with respect to the basis for rejecting applicant Stephen but found that the Employer had failed to explain why it did not attempt to contact applicant Williams by mail, a normal business practice, or provide dates of attempted contacts, as requested. Accordingly, she denied the application based upon the Employer's failure to utilize all reasonable methods of communication with qualified applicants. (AF 85-87).

The Employer requested review of that denial by the Board of Alien Labor Certification Appeals ("Board") by letter of April 12, 1994. (AF 96).

DISCUSSION

Section 656.21(b)(6)² provides that if U.S. applicants have applied for the job opening, the employer must document that such applicants were rejected solely for job-

¹ The correct citation is to section 656.21(b)(6).

² All section references are to title 20 of the Code of Federal Regulations.

related reasons; section 656.20(c)(8) provides that the application must show the job opportunity has been and is open to any qualified U.S. worker; and section 656.21(j) requires the employer to provide the local office with a written report of the results of the employer's post-application recruitment efforts. Under section 656.24(b)(1), the CO's determination whether to grant labor certification is made on the basis of whether the employer has met the requirements of Part 656, but labor certification may be granted despite harmless error, provided that the job market has been tested sufficiently to warrant a finding of unavailability. Under section 656.24(b)(2)(ii), the CO's determination is made based upon whether there is a U.S. worker who is able, willing, qualified, and available for the job opportunity; such worker will be considered able and qualified if "by education, training, experience, or a combination thereof, [the worker] is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed."

In general, an applicant is considered qualified for the job if he or she meets the minimum requirements specified by an employer's application for labor certification. ***The Worcester Co, Inc.***, 93-INA-270 (Dec. 2, 1994); ***First Michigan Bank Corp.***, 92-INA-256 (July 28, 1994). However, an employer may reject an applicant who meets the stated requirements but is nevertheless demonstrably incompetent to perform the main duties of the job, based upon information obtained from references or objective testing during the interview. ***First Michigan Bank Corp., supra.*** Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if it does not state that he or she meets all the job requirements, an employer should further investigate the applicant's credentials by an interview or otherwise. ***See Dearborn Public Schools***, 91-INA-222 (Dec. 7, 1993) (*en banc*); ***Gorchev & Gorchev Graphic Design***, 89-INA-118 (Nov. 29, 1990) (*en banc*).

An employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. Furthermore, although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. ***H.C. LaMarche Enterprises, Inc.***, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In this case, the CO concluded in her Final Determination that one applicant who appeared to have the requisite qualifications, applicant Williams, was rejected for unlawful reasons. In rebuttal and in its request for review, the Employer stated that it made multiple attempts by telephone to get in touch with this applicant. For the reasons set forth below, the Employer has failed to meet its burden of substantiating

that recruitment was conducted in good faith and there were no qualified and available applicants.

We do not write on a clean slate. It is well settled that reasonable and good faith efforts to contact potentially qualified U.S. applicants may require more than a single type of attempted contact. ***Diana Mock***, 88-INA-255 (Apr. 9, 1990). When an Employer's attempt to contact an applicant by telephone is unsuccessful, the Board has found that a certified letter would be a minimally acceptable additional effort. ***Any Phototype, Inc.***, 90-INA-410 (Jan. 16, 1992); ***Gambino's Restaurant***, 90-INA-320 (Sept. 19, 1991). Under the facts in this case, the Employer failed to make sufficient effort to establish a good faith attempt to contact the applicant as the Employer made no attempt to contact applicant Williams by mail as required when telephone contact is unsuccessful. The Employer has therefore failed to document that applicant Williams was rejected solely for lawful, job-related reasons as required by Section 656.21(b)(6).

Furthermore, even if telephone contact could establish a good faith effort to recruit U.S. workers, the Employer's rebuttal response indicates only that there were multiple telephone calls, but no details were given as to the time or circumstances of the calls or by whom they were made. Although specific information was requested by the CO, it was not provided. Thus, the Employer has failed to document that it made a good faith effort to contact applicant Williams by any means. ***See Cracovia General Contracting, Inc.***, 94-INA-296 (June 27, 1995). Accordingly, the CO's denial of labor certification must be AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

PAMELA LAKES WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.